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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Lassen)

MICHAEL CLARK, Plaintiff and Appellant, v. JEFFREY A. BEARD et al., Defendants and Respondents.	C082041 (Super. Ct. No. 59720)

Plaintiff Michael Clark, a state prison inmate representing himself in this case, sued various prison officials and employees. He alleged the way he was detained during a search of the prison -- being handcuffed behind his back and being forced to sit on a stool for six and a half hours -- caused him injuries. The complaint alleged six

negligence per se causes of action based on violations of constitutional, statutory, or regulatory provisions. The trial court sustained defendants' demurrer without leave to amend.

Among other things, Clark now contends his complaint sufficiently alleged negligence causes of action. Required to accept the well-pleaded facts in the complaint, we agree the complaint sufficiently alleged several negligence causes of action. Because we will reverse, we need not reach Clark's other procedural claims (such as that the trial court failed to ensure he had access to the court and improperly refused to file and consider a motion for relief from judgment), except to note that his argument that the trial court improperly granted defendants' motion to change venue is not cognizable on appeal.

BACKGROUND

There is no original complaint in the record on appeal, but defendants demurred to Clark's first amended complaint, arguing among other things that Clark had failed to cite authorities imposing mandatory duties on defendants and that Clark had no private right of action. The trial court overruled the demurrer.

Clark filed a second amended complaint, the operative complaint here, alleging six causes of action for negligence. Each cause of action is based on the same facts, but each asserts a different theory of negligence per se based on constitutional, statutory or regulatory violations. The causes of action were alleged against Jeffrey Beard, who was the secretary of the California Department of Corrections and Rehabilitation (CDCR), Frederic Foulk, the warden of High Desert State Prison (HDSP), and various other CDCR employees, acting individually and as agents of each other, including S. Peery, S. Chapman, C. Lewis, K. Grether, N. Albonico, E. Simmerson, J. Pickett, E. Monk, V. Arredondo, C. Nason, P. Silva, S. Hutson, C. Hammond, and J.A. Zamora. Clark alleged compliance with the government claims statutes, exhaustion of administrative remedies, and statutes of limitation.

The complaint alleged the following facts, which we must accept as true in reviewing an order sustaining a demurrer (see *Barnett v. Fireman's Fund Ins. Co* (2001) 90 Cal.App.4th 500, 504-505):

"On June 3, 2013 at approximately 9:00 a.m. defendant[s] . . . conducted an unclothed body search of [Clark] in his HDSP . . . cell, applied mechanical restraint handcuffs behind his back with palms out, removed him from his cell in nothing but boxer shorts, a t-shirt, and shower shoes, and placed him in the Facility dining hall where, at gunpoint, he was forced to remain handcuffed, behind his back palms out, sitting on a hard steel table stool, without food, water, or opportunity to relieve his bowel or bladder, for six and one half (6½) hours, until 3:30 p.m. Despite [Clark's] pleas of pain and obvious undue physical discomfort, defendants . . . would not replace the handcuffs with a waist chain or relocate them in front of [Clark's] body . . . for restroom use. When [Clark] attempted to shift positions on the hard steel stool or stand to lessen the extreme pain and undue physical discomfort the length of time in handcuffs behind his back caused, defendant[s] threatened to shoot [Clark] with a firearm if he did not remain still and seated properly on the table stool." Clark further alleged that defendants denied and covered up the actions against him.

As "damages," Clark alleged "general damages, negligence, per se negligence, violation of mandatory duties, cruel and/or unusual punishment, unauthorized injury to a prisoner, hunger, thirst, fear, extreme shoulder, wrist, arm, nerve, stomach, and lower back pain, depression, headache, physical and mental stress, physical discomfort, restricted blood flow, anguish, anger, hatred, feelings of helplessness, frustration, humiliation, intimidation, loss of sleep, suicidal and violence ideology, and complete loss of faith in public officials and institutions." As remedies, Clark sought general damages, compensatory damages, punitive damages, declaratory relief, and injunctive relief.

Defendants filed a motion to change venue to Lassen County, where the alleged actions occurred. The Sacramento Superior Court granted the motion.

In Lassen County, defendants again demurred. They argued the alleged facts were vague and uncertain and they were immune under Government Code section 820.8. The trial court sustained the demurrer without leave to amend, ruling that the complaint failed to state facts sufficient to constitute a cause of action and that defendants are immune under Government Code section 820.8. The trial court dismissed the complaint.

DISCUSSION

I

Clark contends his negligence causes of action were based on negligence per se, and that the alleged constitutional, statutory and regulatory violations establish the duty and standard of care elements for negligence causes of action.

A

As a threshold matter, defendants assert that Clark forfeited his appellate contentions regarding the merits of the demurrer because he did not oppose the demurrer in the trial court.

Although the trial court's order sustaining the demurrer noted that Clark did not file opposition to the demurrer and did not appear at the hearing on the demurrer, the trial court nevertheless considered the demurrer on the merits and ruled on the merits. Our consideration of the merits of the demurrer would not be unfair to defendants because they fully argued the merits by way of their demurrer. (See *Porterville Citizens for Responsible Hillside Development v. City of Porterville* (2007) 157 Cal.App.4th 885, 912.)

In his opening brief on appeal, Clark claims he did not file opposition because the trial court failed to assure that Clark had access. We need not consider Clark's claims about access because his lack of opposition to the demurrer in the trial court is not necessarily fatal to the merits of his contentions at this stage of the proceeding. (See *People v. Williams* (1998) 17 Cal.4th 148, 161, fn. 6 [appellate court has discretion to

consider otherwise forfeited issues].) We will consider Clark's contentions concerning the merits of the demurrer ruling.

B

We now turn to the merits of Clark's assertion on appeal that the allegations of his second amended complaint sufficiently stated the duty and standard of care elements for his negligence causes of action. "The essential elements of a cause of action for negligence are: (1) the defendant's legal duty of care toward the plaintiff; (2) the defendant's breach of duty -- the negligent act or omission; (3) injury to the plaintiff as a result of the breach -- proximate or legal cause; and (4) damage to the plaintiff." (*Leyva v. Garcia* (2018) 20 Cal.App.5th 1095, 1103.)

"Evidence Code section 669, subdivision (a) codifies the common law doctrine of negligence per se, under which statutes and regulations may be used to establish duties and standards of care in negligence actions . . . ." (*Millard v. Biosources, Inc.* (2007) 156 Cal.App.4th 1338, 1350; see *Elsner v. Uveges* (2004) 34 Cal.4th 915, 927, fn. 8 (*Elsner*) ["Statutes may be borrowed in the negligence context for one of two purposes: (1) to establish a duty of care, or (2) to establish a standard of care."].) Negligence per se is not a separate cause of action. (*Millard, supra,* 156 Cal.App.4th at p. 1353, fn. 2.)

Proof that a defendant violated an administrative regulation may give rise to a presumption of negligence under the doctrine of negligence per se. (Evid. Code, § 669; *Elsner, supra,* 34 Cal.4th at p. 927.) However, a plaintiff must, at a minimum, "produce evidence of a violation of a statute [or regulation]" and evidence supporting "a substantial probability that the plaintiff's injury was caused by the violation." (*National Council Against Health Fraud, Inc. v. King Bio Pharmaceuticals, Inc.* (2003) 107 Cal.App.4th 1336, 1347.) "Nearly all the cases in which the presumption of negligence under Evidence Code section 669 has been applied involve what may be termed 'safety' statutes, ordinances or regulations, that is, governmentally designed standards of care intended to protect a particular class of persons from the risk of particular accidental

injuries. [Citations.]" (*Sierra-Bay Fed. Land Bank Assn. v. Superior Court* (1991) 227 Cal.App.3d 318, 333-334 (*Sierra-Bay*).)

Each of Clark's causes of action for negligence alleged violation of at least one constitutional, statutory or regulatory provision under the theory of negligence per se to establish defendants' duty and standard of care. We therefore consider each cause of action and whether Clark sufficiently alleged negligence per se. Although Clark alleged multiple violations in connection with some causes of action, he specified in his appellant's opening brief the primary provision he relies upon for each cause of action.

For the first cause of action, Clark asserts that California Code of Regulations, title 15, section 3268.2, subdivision (c)(3) prohibits application of mechanical restraints on a prisoner "in a way likely to cause undue physical discomfort or restrict blood flow or breathing, e.g., hog-tying." Clark alleges he was handcuffed in a way that caused undue physical discomfort, restricted bloodflow and injury. The cause of action sufficiently pleads a violation of a regulation meant to protect Clark.

As to the second cause of action, Clark alleges that Penal Code section 2652 prohibits "cruel, corporal or unusual punishment or [infliction of] any treatment or [] any lack of care whatever which would injur[e] or impair the health of the prisoner . . . ." Clark sufficiently alleges specific facts asserting that the manner in which he was detained unnecessarily injured him.

Regarding the third cause of action, Clark claims Penal Code section 2651 provides: "No punishment, except as may be authorized by the Director of Corrections, shall be inflicted and then only by the order and under the direction of the wardens. . . ." Clark did not clearly allege a violation of Penal Code section 2651; instead, he alleged that the guards who detained him acted "pursuant to instructions" of the Secretary and Warden. Therefore, Clark's allegations contradict his assertion that the Secretary did not authorize and the Warden did not order the detention, and the third cause of action does not allege facts sufficient to constitute a cause of action.

Turning to the fourth cause of action, Clark asserts that article I, section 17 of the California Constitution prohibits cruel or unusual punishment. However, Evidence Code section 669, codifying the doctrine of negligence per se, does not list constitutional violations as a presumed basis for the failure to exercise due care, and Clark provides no authority that a negligence-per-se theory may be predicated on a constitutional provision. The allegations are therefore insufficient to assert liability on a theory that the California Constitution established a duty and standard of care.

In the fifth cause of action, Clark alleges California Code of Regulations, title 15, section 3268.2, subdivision (b) allows use of physical restraints on a prisoner only under specified circumstances.[1] Clark alleges those circumstances did not exist at the time of his restraint and he was injured as a result of the violation of the regulation. The allegations are sufficient to support a negligence cause of action.

As for the sixth cause of action, Clark cites California Code of Regulations, title 15, section 3287, subdivision (a)(3), which provides that if reasonably possible and safe to do so, an inmate should be permitted to observe a search if the inmate is suspected of having a specific item of contraband. But Clark also alleges he was not suspected of having any specific item of contraband. Moreover, he does not sufficiently allege facts showing proximate causation, that his alleged injuries are sufficiently connected to the particular regulatory violation cited in the sixth cause of action. (*Kumaraperu v. Feldsted* (2015) 237 Cal.App.4th 60, 69.) Accordingly, the allegations are insufficient to state a cause of action.

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[1] California Code of Regulations, title 15, section 3268.2, subdivision (b) provides: "Mechanical means of physical restraint may be used only under the following circumstances: (1) When transporting a person between locations. [¶] (2) When a person's history, present behavior, apparent emotional state, or other conditions present a reasonable likelihood that he or she may become violent or attempt to escape. [¶] (3) When directed by licensed health care clinicians, to prevent a person from attempting suicide or inflicting injury to himself or herself."

In summary, Clark's first, second, and fifth causes of action state sufficient facts under the negligence-per-se theory alleged. His third, fourth, and sixth causes of action do not state facts sufficient to support a cause of action.

Having applied the negligence-per-se theory to Clark's causes of action, we turn to the Attorney General's arguments.

The Attorney General argues a statute or regulation may support a negligence cause of action based on the negligence-per-se theory only if the statute or regulation imposes a mandatory, rather than discretionary, duty on the public official or employee. In support of this argument, the Attorney General cites cases in which the plaintiff sought to enforce the statute itself. (See, e.g., *Caldwell v. Montoya* (1995) 10 Cal.4th 972, 987, fn. 8.)[2] This argument that the negligence-per-se theory applies only when the statute or regulation imposes a mandatory duty misses the mark because Clark is not attempting to enforce the provisions cited; instead, he is merely using the provisions, whether statutory or regulatory, to establish duty and standard of care under the negligence-per-se theory.

This court discussed that distinction in *Sierra-Bay, supra,* 227 Cal.App.3d at p. 333: "The adoption of a statutory standard of conduct in a negligence action may well result in the imposition of liability where none might otherwise be imposed. This is so because the statutorily established standard of care may be more exacting than the standard a defendant might be able to convince a jury that a reasonable person would follow. In addition, a statute may impose a duty where none existed at common law. 'A

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[2] Even though the Attorney General does not cite Government Code section 815.6, that statute appears to be the source of the Attorney General's "mandatory duty" argument. That section provides that a "public entity" is liable for injury resulting from failure to discharge a "mandatory duty." (Gov. Code, § 815.6.) In this case, however, Clark has not sued a public entity, he has sued individual public officials and employees. "Except as otherwise provided by statute (including [Government Code] Section 820.2), a public employee is liable for injury caused by his act or omission to the same extent as a private person." (Gov. Code, § 820, subd. (a).)

duty of care, and the attendant standard of conduct required of a reasonable man, may of course be found in a legislative enactment which does not provide for civil liability.' [Citations.] Nevertheless, it is the tort of negligence, and not the violation of the statute itself, which entitles a plaintiff to recover civil damages. In such circumstances the plaintiff is not attempting to pursue a private cause of action for violation of the statute; rather, he is pursuing a negligence action and is relying upon the violation of a statute, ordinance, or regulation to establish part of that cause of action." (Fns. omitted.)

In addition, the Attorney General asserts that the superior court properly sustained the demurrer because the complaint was vague and uncertain. He claims "the complaint did not specify what the defendants-respondents allegedly did or did not do." To the contrary, as quoted above, the complaint alleged defendants either directly performed the alleged actions that caused injury or directed that the actions be performed. The allegations were sufficient.

The Attorney General further argues Clark failed to allege causation and harm. But Clark alleged he suffered injuries caused by the manner in which defendants physically restrained him or directed that he be physically restrained.

Moreover, the Attorney General claims defendants are immune from liability because they cannot be held vicariously liable for the acts of others. Government Code section 820.8 provides: "Except as otherwise provided by statute, a public employee is not liable for an injury caused by the act or omission of another person. Nothing in this section exonerates a public employee from liability for injury proximately caused by his own negligent or wrongful act or omission." A public employee enjoys broad immunity from suit and may be held liable only upon proof of narrowly focused, specific factual allegations regarding misconduct outside the immunity generally afforded to them. (See Gov. Code, § 820.2 [public employee not liable for injury where act or omission is result of exercise of discretion, whether or not such discretion is abused]; *Taylor v. Buff* (1985) 172 Cal.App.3d 384, 390 [sheriff immune from suit under Gov. Code, § 820.2 for policy

decision not to use limited funds to replace cell locks in state of disrepair resulting in injuries to inmate]; see also Gov. Code, § 951 [requiring plaintiff suing local official in his or her individual capacity for actions undertaken under color of law to allege "with particularity sufficient material facts to establish the individual liability" of the official].)

While there are some elements of the allegations that could lead to a conclusion that Clark is seeking to impose vicarious liability on defendants (for example, he alleges agency relationships among defendants), there are also allegations that each defendant personally undertook or directed the actions that caused injury. That is sufficient to allege injury proximately caused by the public employees' own negligent or wrong act or omission.

Finally, we consider whether defendants were immune from liability under Government Code section 820.2, which provides: "Except as otherwise provided by statute, a public employee is not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him, whether or not such discretion be abused."[3]

"Whether or not a public employee is immune from liability under [Government Code] section 820.2 depends in many cases upon whether the act in question is 'discretionary' or 'ministerial.' [Citation.] Classification of the act as 'discretionary' will not produce immunity if the injury to another results, not from the employee's exercise of 'discretion vested in him' but from his negligence in performing it after having made the discretionary decision to do so. [Citation.]" (*Sullivan v. City of Sacramento* (1987) 190 Cal.App.3d 1070, 1081; see also *Barner v. Leeds* (2000)

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3 Government Code section 820.2 may also be what the Attorney General bases his mandatory/discretionary analysis of the causes of action. Even if so, no citation to Government Code section 820.2 is provided in the part of the Attorney General's brief discussing the mandatory/discretionary analysis and he does not explain how to apply that statute.

24 Cal.4th 676, 684-685 [immunity meant to protect basic policy decisions, not lower level decisions implementing policy].) Furthermore, Government Code section 820.2 does not apply when an officer uses unreasonable force. (*Blankenhorn v. City of Orange* (9th Cir. 2007) 485 F.3d 463, 487; *Scruggs v. Haynes* (1967) 252 Cal.App.2d 256, 264.) Because Clark's complaint alleges use of force in violation of statutory and regulatory provisions, Government Code section 820.2 immunity does not foreclose liability.

Although we will reverse and remand, we express no opinion on whether Clark can prove his allegations. Our task on appeal after the sustaining of a demurrer is to determine whether, accepting as true the factual allegations in the complaint, sufficient facts were alleged to constitute a cause of action. (*Hernandez v. City of Pomona* (1996) 49 Cal.App.4th 1492, 1497.) Under this standard, we must reverse because Clark alleged facts sufficient to sustain the first, second, and fifth causes of action.

II

Clark further contends the trial court erred by granting defendants' motion to change venue to Lassen County without affording Clark the opportunity to appear by telephone. However, an order transferring venue is reviewable only by petition for writ of mandate. (*K.R.L. Partnership v. Superior Court* (2004) 120 Cal.App.4th 490, 496, fn. 6.) Clark's venue contention in not cognizable on appeal.

But even if error occurred, we would not reverse the venue order because there was no miscarriage of justice. Clark argues that a miscarriage of justice occurred because the action was transferred and judgment was eventually entered against Clark. However, he does not explain why a change of venue and entry of judgment are, by themselves, a miscarriage of justice. Accordingly, if the venue order were cognizable on appeal, we would not reverse the venue order because there was no demonstrated miscarriage of justice. (Cal. Const., art. VI, § 13.)

DISPOSITION

The judgment is reversed and remanded to the trial court for further proceedings consistent with this opinion. Clark is awarded his costs on appeal. (Cal. Rules of Court, rule 8.278(a).)

/S/
MAURO, Acting P. J.

We concur:

/S/
HOCH, J.

/S/
RENNER, J.